Supreme Court, U.S.
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(2)

No. 91-446

IN THE
SUPREME COURT OF THE UNITED STATES

PETER R. CASTELLANO, et al.,

Petitioners,

-against-

BOARD OF TRUSTEES OF THE POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 15, 1991

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COUNTER STATEMENT OF QUESTION PRESENTED

Did the New York State Legislature violate the contract or equal protection clauses of the United States Constitution in 1970 when it created "variable supplements," a type of payment to retired police officers and firefighters, but limited variable supplements to those who retired "for service," i.e., after 20 years of service and without a physical disability, where: (a) petitioners allege that the collective bargaining agreement that first called for variable supplements did not limit variable supplements to retirees for service only, but (i) the Court of Appeals herein found that the collective bargaining agreement alleged by petitioners in fact was silent on the question of which retirees would receive variable supplements and (ii) respondents assert that discovery and trial in this action would reveal that the collective bargaining

agreement in fact did limit variable supplements to retirees for service; and (b) under New York law the collective bargaining agreement's provision for variable supplements was not enforceable against the City until ratified by the Legislature?

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STATEMENT OF THE CASE

The present petition arises from a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted. The relevant factual allegations in the Complaint, and relevant facts of which this Court can take judicial notice, are as follows.

Petitioners are retired New York City police officers (Appendix to Petition ["Pet. App."] at A-23). Some of the petitioners retired after becoming disabled from an injury received in the line of duty ("accident disability") (id.). See NYC Administrative Code ("Code") § 13-252. Some of the petitioners retired after becoming disabled from an injury not received in the line of duty or from a physically disabling condition ("ordinary disability") (Pet. App. at A-23). See Code § 13-251. The remainder of the petitioners retired, after more than 15 but less than 20 years of service and without a physical disability, with a vested deferred retirement benefit ("vested right") (Pet. App. at A-23). See Code § 13-256. None of the petitioners retired after completing 20 or more years of service without a physical disability, i.e., "for service" (Pet. App. at A-23). See Code § 13-246.

The Police Pension Fund

The Police Pension Fund, sometimes referred to as the "Article II" or "Subchapter II" pension fund, is funded by contributions from police officers, who are "members" of the fund, Code §§ 13-214[5], 13-215[a], and by contributions from the City, Code §§ 13-228, 13-229. Upon retirement, a member's contributions fund an annuity that becomes part of the member's retirement allowance. Code §§ 13-255[1], 13-256[c](1), 13-257[1], 13-258[1]. The amount of the remainder of the member's retirement allowance is determined by factors such as the member's length of service and final salary and is not affected by the performance of the assets in the Pension Fund. Code §§ 13-255 to 13-258. Thus, the remainder of a police officer's retirement allowance is derived almost exclusively from the City's contributions and the earnings on

the City's contributions. Code §§ 13-228, 13-229. The total retirement allowance is guaranteed by the City. Code § 13-231[a].

The New York State Constitution, in its public pension clause, deems pension rights and benefits of employees of New York State and its political subdivisions to be contract rights that may not be diminished. New York State Const. art. V § 7 (Petition at 2).

Prior to 1969, the trustees of the Pension Fund were authorized to invest the assets of the Pension Fund only in fixed-income obligations, i.e., bonds and notes. Local Law 2 of 1940 (City of New York) (formerly codified at Code § B18-28.0).

Variable Supplements

In collective bargaining negotiations for the period October 1, 1968 through September 30, 1971, representatives of the City's police officers and firefighters

proposed that the pension enjoyed by retirees for service be increased from 50 percent of their annual compensation at retirement to 60 percent. When the City indicated that it could not afford such an increase, the unions proposed that the trustees of the police and fire pension funds be permitted to invest those funds' assets in equities, i.e., corporate stock, and that the resulting increase in investment earnings be distributed to service retirees.

The City and the unions eventually agreed upon the variable supplement program. The unions and the City also agreed to provide for vested right pensions, which had not previously existed, and to increase the pensions of ordinary disability retirees from not less than one-fourth of annual compensation at retirement to one-third, for those who had fewer than 10 years of service, and one-half, for those

who had more than 10 but fewer than 20 years of service. The parties also agreed jointly to request the Legislature to enact a law embodying their agreement. Action by the Legislature was necessary because section 113[b] of the New York Retirement and Social Security Law prohibits municipalities from, inter alia, amending any law relating to pensions or other benefits payable by any pension or retirement system administered by them.

Chapter 876 of the Laws of 1970 authorized the trustees of the Pension Fund to invest up to half of the fund's assets in equities. See Code § 13-233[b](1). That statute also created the variable supplement funds, which until 1988 operated essentially as follows.[1] Each year, the return on the

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[1] The 1988 changes to the variable supplement program are not relevant here.

Pension Fund's assets invested in equities is compared to a hypothetical return that would have been earned had those assets been invested in fixed-income obligations. When the return on equities exceeds the hypothetical return on fixed-income obligations, the difference is transferred to the variable supplement funds. For a year in which the return on equities is less than the hypothetical return on fixed-income obligations, there is no transfer to or from the variable supplement funds. However, before a transfer to the variable supplement funds may take place after such a year, the hypothetical loss on equities in that year must be offset in subsequent years by returns on equities in excess of the hypothetical return on fixed-income obligations. See Code § 13-232 (prior to 1988 amendment).

There are two variable supplement funds, the police superior officer's variable supplement fund, Code §§ 13-278 to 13-287, from which distributions are made to police officers who retired with the rank of sergeant or higher and all detectives, Code §§ 13-278[4] & [5], 13-281[a], and the police officer's variable supplement fund, Code §§ 13-268 to 13-277, from which distributions are made to police officers who retired in other ranks, Code §§ 13-268[4] & [5], 13-271[a] (prior to 1988 amendments). The two variable supplement funds are corporations and are entities separate from the Pension Fund. Code §§ 13-272, 13-282. Transfers from the Pension Fund are divided between the two variable supplement funds pursuant to a statutory formula. Code § 13-232[d] (prior to 1988 amendment); Poggi v. City of New York, 67 NY2d 794, 501 NYS2d 324, 492 NE2d 397 (1986), aff'g for

the reasons stated in the opinion at 109 AD2d 265, 491 NYS2d 331 (1st Dept, 1985).

Chapter 876 specifically provided that distributions from the variable supplement funds be made only to police officers who retired for service. Code §§ 13-268[5], 13-278[5]. Chapter 876 also specifically provided that the variable supplement funds "shall not be, and shall not be construed to constitute, a pension or retirement system or fund" and that distributions from those funds do not constitute "a pension or retirement allowance." Code §§ 13-269[b], 13-279[b].

ARGUMENT

THE PETITION SHOULD NOT BE GRANTED BECAUSE: (1) THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT ON A POINT OF LAW WITH ANY OTHER DECISION; (2) THE DECISION WAS RENDERED ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND THE PIVOTAL FACTUAL ASSERTION IN THE COMPLAINT IS CONTRARY TO FACT; AND (3) THE DECISION LARGELY TURNED ON ISSUES OF STATE LAW.

(1)

The petition should not be granted for three reasons. First, the Court of Appeals' decision is not in conflict on a point of law with any decision of this Court or of any other Court of Appeals and petitioners do not contend otherwise. Instead, the petition argues only that petitioners should have prevailed below. It should also be noted that, to our knowledge, variable supplements are unique to the City of New York.

(2)

Second, the pivotal factual assertion in the Complaint, which of course is taken as true on this motion, is contrary to fact.

In the Courts below and in the petition here, petitioners have taken the Complaint's statement that the collective bargaining agreement provided for variable supplements for "members who retired after 1968" (Pet. App. at A-27) to mean all members who retired after 1968 (Petition at 7).[2] However, the terms of the collective bargaining agreement for 1968-71 never were reduced to a single, integrated document. See generally Patrolmen's Benevolent

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[2] The Court of Appeals properly refused to read the word "all" into this allegation and properly took the complaint to allege that the collective bargaining agreement did not specify which of those members who retired after 1968 would receive variable supplements (Pet. App. at A-9, A-9 to A-10).

Association v. City of New York, 27 NY2d 410, 318 NYS2d 477, 267 NE2d 259 (1971) (denying union's summary judgment motion in union's action for alleged breach of collective bargaining agreement for that period). What petitioners put in the record below as the collective bargaining agreement (Appendix hereto ["Res. App."] at RA-20 to RA-23) is in fact a "cut-and-pasted" document that the union leadership submitted to the rank-and-file for approval. Nowhere does it bear the signature of any representative of the City, nor does it even have space where signatures are to be affixed (id. at RA-23).

In fact, discovery and trial herein would show that the City and union negotiators agreed that variable supplements would be paid only to service retirees. This is shown most clearly by the fact that the unions, as well as the City, submitted proposed legislation providing for the

variable supplement program and the union's proposal, as well as the City's proposal, explicitly provided that variable supplements would be paid to services retirees only (Res. App. at RA-18 to RA-19) [union's bill]).

Thus, for this Court to grant the writ and address the factual assertions of the Complaint would be to engage in an exercise based on fiction. If this Court were to reverse the Court of Appeals and deny respondents' motion to dismiss, discovery and trial herein would show that this Court's decision was based on hypothetical, rather than actual, facts. We respectfully submit that that would not be a judicious use of the resources of this very busy Court.

(3)

Third, the Court of Appeals' decision turned largely on issues of New York State law. After finding no violation of the equal protection clause under traditional equal

protection analysis, US Const. amend. XIV (Pet. App. at A-6 to A-8), the Court of Appeals considered petitioners' additional argument that the reasonableness of the legislation must be tested against only the particular terms of the collective bargaining agreement that the legislation was to implement (id. at A-8). The Court of Appeals rejected that argument on the basis of the New York State Constitution (Pet. App. at A-9 [citing NY Const. art. IX § 2(b)(3)]). See also NY Retirement and Social Security Law § 113[b] (cities have no power to modify laws concerning pensions of municipal employees) (RA-1).

The Court of Appeals rejected petitioners' contract clause claim, US Const. art. I § 10, because it found that the collective bargaining agreement left open the question of which retirees would receive variable supplements (Pet. App. at A-9 to

A-10; see supra p. 11 n.2). Respondents also argued that even assuming that the Complaint alleged that all retiring members were to receive variable supplements, everyone understood that this obligation on the City's part would not be enforceable because New York law requires that such an obligation be ratified by the Legislature. NY Retirement and Social Security Law § 113[b] (cities have no power to modify laws concerning pensions of municipal employees) (RA-1).

Finally, the Court of Appeals rejected petitioners' due process claim, US Const. amend. XIV, by following its previous decision that members of the Pension Fund have no property interest in the assets or earnings of the fund (Pet. App. at A-11 [citing Crown v. Trustees of the Patrolmen's Variable Supplements Fund, 659 F Supp 318, 320 (SDNY), aff'd, 819 F2d 47 (2d Cir,

1987) (per curiam)]). This required analysis of article V, section 7 of the New York State Constitution (Petition at 2) and various sections of the New York City Administrative Code (see supra pp. 3-9).

Thus, the Court of Appeals' decision was based largely on State law. We respectfully submit that it would not be a judicious use of this Court's resources to grant the writ in order to review a case involving so many questions of State law.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX

NEW YORK RETIREMENT AND SOCIAL SECURITY LAW SECTION 113[b]

Notwithstanding any inconsistent provisions of any general, special or local law, ordinance or city or village charter, no municipality shall have power to add, change, modify, supersede, amend or repeal any provision relating to contributions payable to or pensions, annuities, or other benefits payable by any pension or retirement system or fund administered by such municipality or an agency thereof for the benefit of officers or employees of such municipality ....

RELEVANT PROVISIONS OF THE NEW YORK CITY ADMINISTRATIVE CODE[3]

§ 13-214 **Definitions.**

* * *

5. "Beneficiary" shall mean any person in receipt of a pension, an annuity, a retirement allowance, a dependent benefit, a death benefit or any other benefit provided by this subchapter.

* * *

§ 13-215 **Membership; composition and eligibility.** a. The membership of the pension fund shall consist of:

(1) all persons in city-service, as defined in this subchapter, in position in the competitive class of the civil service, who shall serve probationary periods, or who shall receive permanent appointments in the police force after the time when this section shall take effect; and

(2) all persons in city-service, as defined in this subchapter, who hold a

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[3] References to "former" sections are references to the sections as they existed before the 1988 amendments, which are not relevant here.

position of surgeon of police classified in the non-competitive class of the civil service.

* * *

§ 13-229 **Contributions of the city and their use; pension reserve fund.** The pension reserve fund shall be the fund from which shall be paid all pensions, and all pensions-provided-for-increased-take-home-pay, and all benefits in lieu of pensions, and all benefits in lieu of pensions-providing-for-increased-take-home-pay, if any, allowable by the city on account of the city-service of members....

[former] § 13-231 **Guarantee of funds.** a. Regular interest, charges payable, the creation and maintenance of reserves in the contingent reserve fund and the pension reserve fund and the maintenance of annuity reserves, pension reserves, dependent benefit reserves and reserves-for-increased-take-home-pay as provided for in this subchapter and the payment of all pensions-providing-for-increased-take-home pay, annuities, retirement allowances, refunds, death benefits, dependent benefits and any other benefits granted under the provisions of this chapter, are thereby made obligations of the city. Except as otherwise provided in section 13-232 of this subchapter, all income, interest and dividends derived from deposits and investments authorized by this subchapter shall be used and disposed of in the manner prescribed by subdivision b of this section. Upon the basis of each actuarial determination and appraisal provided for in this subchapter, the commissioner shall prepare pursuant to section one hundred twelve of the charter and submit to the

director of management and budget an itemized estimate of the amounts necessary to be appropriated by the city to the various funds to provide for payment in full during the ensuing fiscal year of all such obligations of the city accruing during the ensuing fiscal year. There shall be included annually in the budget a sum sufficient to provide for such obligations of the city. The comptroller shall pay the sums so provided into the various funds provided for by this subchapter, subject to the provisions of subdivision b of this section.

* * *

§ 13-251 **Retirement; for ordinary disability.** Medical examination of a member in city-service for ordinary disability shall be made upon the application of the commissioner, or upon the application of such member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of duty and ought to be retired. If such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefore with the pension fund.

§ 13-252 **Retirement; for accident disability.** Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or

upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of willful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of willful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

§ 13-255 **Retirement allowances; for service.** Upon retirement for service, a member shall receive a retirement allowance which shall consist of:

1. An annuity based on his or her required annuity savings at the termination of his or her required minimum period of service and in addition, a pension which when added to the annuity shall be equal to one-half of his or her annual earnable compensation on the date of retirement, for his or her minimum period of service. For

the purpose only of determining the pension portion of the retirement allowance for minimum service, the member's annuity shall be computed at it would be, (a) if it were not reduced by the actuarial equivalent of any outstanding loan, (b) if it were not increased by the actuarial equivalent of any additional contributions, (c) if were not reduced by reason of the member's election to decrease his or her annuity contributions in order to apply the amount of such reduction in payment of his or her contributions for old-age and survivors insurance coverage, (d) as it would be without any optional modification;

2. For each additional year of service in the police force, or fraction thereof, beyond his or her required minimum service, a member shall be entitled to, in addition to the benefits provided in subdivision one of this section:

(a) a pension of one-sixtieth of his or her average annual earnings from his or her date of eligibility for retirement to the actual date of retirement; and

(b) a pension-providing-for-increased-take-home-pay which shall be the actuarial equivalent of the reserve-for-increased-take-home-pay to which he or she may be entitled, if any, for all periods of such service in the police force rendered both (1) after the completion of such required minimum service in such police force and (2) after December thirty-first, nineteen hundred sixty-six.

3. For each year, or fraction thereof, of service credit transferred from the New York city employees' retirement system, a

pension of fiftyfive per cent of one-sixtieth of his or her final compensation if such service credit was for service rendered prior to October first, nineteen hundred fifty-one, or seventy-five per cent of one-sixtieth of his or her final compensation if such service was rendered subsequent to October first, nineteen hundred fifty-one.

§ 13-256 **Vested retirement rights.** a. Any member who:

(1) discontinues police service on or after July first, nineteen hundred sixty-nine, other than by death, retirement or dismissal; and

(2) prior to such discontinuance, completed fifteen or more years of allowable police service, at least five of which immediately preceded such discontinuance; and

(3) does not withdraw his or her accumulated deductions in whole or in part; and

(4) at least thirty days prior to the date of such discontinuance, files a duly executed application for a deferred retirement allowance hereunder, shall have a vested right to receive a deferred retirement allowance as provided in this section.

b. (1) Upon such discontinuance under the conditions and in compliance with the provisions of subdivision a of this section, such deferred retirement allowance shall vest automatically.

(2) Such retirement allowance shall become payable on the earliest date on which

such discontinued member could have retired for service if discontinuance had not occurred.

c. Such deferred retirement allowance shall consist of:

(1) an annuity which is the actuarial equivalent of an amount equal to the member's accumulated deductions for the period of his or her police service, plus any accumulated contributions transferred to his or her credit pursuant to section forty-three of the retirement and social security law, as the total of such accumulated deductions and contributions is on the earliest date on which such member could have retired for service; and

(2) a pension, which together with his or her annuity shall be equal to:

(i) in the case of any discontinued member whose minimum period for service retirement is twenty years, two and one-half per cent of his or her annual earnable compensation on the date of his or her discontinuance of police service, multiplied by a number equal to the number of years of allowable police service credited to him or her on the date of such discontinuance, plus the number of his or her years of service for which credit was transferred pursuant to section forty-three of the retirement and social security law; or

(ii) in the case of any discontinued member whose minimum period for service retirement is twenty-five years, two per cent of his or her annual earnable compensation on the date of his or her discontinuance of police service, multiplied by a number equal

to the number of years of allowable police service credited to him or her on the date of his or her discontinuance of police service, plus the number of years of his or her service for which credit was transferred pursuant to section forty-three of the retirement and social security law; and

(3) for each year, or fraction thereof, of his or her service credit transferred from the New York city employees' retirement system, a pension of fifty-five per cent of one-sixtieth of his or her final compensation if such service credit was for service rendered prior to October first, nineteen hundred fifty-one, or seventy-five per cent of one-sixtieth of his or her final compensation if such service was rendered on or after October first, nineteen hundred fifty-one.

* * *

§ 13-257 **Retirement allowances; for ordinary disability.** Upon retirement for ordinary disability, a member shall receive a retirement allowance which shall consisted of:

1. An annuity which shall be the actuarial equivalent of his or her accumulated deductions at the time of his or her retirement; and

2. A pension which is actuarial equivalent of the reserve-for-increased-take-home-pay to which he or she may then be entitled, if any; and

3. A pension, which, together with his or her annuity and the pension-providing-for-increased-take-home-pay, if any, shall be equal to:

a. In the case of a member who contributes on the basis of retirement after twenty years of city-service, a retirement allowance equal to one-fortieth of his or her annual earnable compensation on the date of retirement multiplied by the number of years of city-service credited to him or her, but not less than (i) one-half of his or her annual earnable compensation on the date of retirement, if the years of city-service credited to him or her are ten or more, or (ii) one-third of his or her annual earnable compensation on the date of retirement, if the years of city-service credited to him or her are less than ten; or

b. In the case of a member who contributes on the basis of retirement after twenty-five years of city-service, a retirement allowance equal to one-fiftieth of his or her annual earnable compensation on the date of retirement, multiplied by the number of years of city-service credited to him or her, but not less than one-half of his or her annual earnable compensation on the date of retirement, if the years of city-service credited to him or her are ten or more, or (ii) one-third of his or her annual earnable compensation on the date of retirement, if the years of city-service credited to him or her are less than ten; or

c. (1) In the case of a member who contributes on the basis of retirement at age fifty-five the retirement allowance that would be payable to him or her after a like amount of total- service and annual earnable compensation on the date of retirement, had he or she attained his or her minimum age for service retirement if such retirement allowance exceeds one-quarter of his or her

annual earnable compensation on the date of retirement; otherwise,

(2) The retirement allowance not exceeding one-quarter of his or her annual earnable compensation on date of retirement, that would be paid to him or her were his or her service and present annual earnable compensation on the date of retirement to continue until attainment by him or her of his or her minimum age of service retirement.

* * *

§ 13-258 **Retirement allowances; for accident disability.** Upon retirement for accident disability, a member shall receive a retirement allowance which shall consist of:

1. An annuity which shall be the actuarial equivalent of his or her accumulated deductions at the time of his or her retirement; and

2. A pension which is actuarial equivalent of the reserve-for-increased-take-home-pay to which he or she may then be entitled, if any; and

3. A pension, of three-quarters of his or her annual earnable compensation on the date of retirement, in addition to the annuity and pension provided for by subdivisions one and two of this section.

SUBCHAPTER 3

§ 13-268 **Definitions.** As used in this subchapter, the following words and phrases shall have the following meanings, unless a

different meaning is plainly required by the context:

1. "Variable supplements fund". The police officer's variable supplements fund established by this subchapter.

2. "Association". The patrolmen's benevolent association of the city of New York.

3. "Fiscal year". Any year commencing with the first day of July and ending with the thirtieth day of June next following.

4. "Board". The board of trustees provided for in section 13-270 of this subchapter.

5. "Pension fund beneficiary". Any person who (a) receives a retirement allowance by reason of having retired for service as a member of pension fund, subchapter one or pension fund, subchapter two and as a police officer, or (b) receives a benefit by reason of election of an option by such a retired police officer.

6. "Variable supplement". Any sum authorized to be paid to a pension fund beneficiary by the board pursuant to the provisions of this subchapter.

* * *

§ 13-269 **Police Officer's variable supplements fund.** a. There is hereby established a fund, to be known as the police officer's variable supplements fund. Such fund shall consist of such monies as may be paid thereto from pension fund,

subchapter two, pursuant to the provisions of section 13-232 of this chapter and all other monies received by such fund from any other source pursuant to law.

b. It is hereby declared by the legislature that the police officer's variable supplements fund shall not be, and shall not be construed to constitute, a pension or retirement system or fund, and that it shall function as a means whereby payments, not constituting a pension or retirement allowance, may be made at the discretion of the board in accordance with the provisions of this subchapter, to eligible pension fund beneficiaries as a supplement to benefits received by them under subchapter one or two of this title. The legislature hereby reserves to the state of New York and itself the right and power to amend, modify or repeal any or all of the provisions of this subchapter.

§ 13-270 **Board of trustees.** a. The variable supplements fund shall be administered by a board of trustees which shall, subject to applicable provisions of law and to the prior approval of the board of estimate, from time to time establish rules and regulations for the administration and transaction of the business of such fund and for the control and disposition thereof.

b. Such board shall consist of:

1. The representative of the mayor who is a member of the board of trustees of pension fund, subchapter two, who shall be entitled to cast one vote. The mayor may, by instrument in writing filed in his or her office and with the board, designate one or more members of his or her office to act in

the place of such representative at meetings of the board, in the event of such representative's absence therefrom.

2. The comptroller of the city, who shall be entitled to cast one vote. Any deputy comptroller authorized pursuant to subdivision b of section ninety-four of the New York city charter, to act in the place of the comptroller as a member of the board of trustees of pension fund, subchapter two, may be authorized by the comptroller, in accordance with the provisions of such subdivision b, to act in the place of the comptroller as a member of the board.

3. Two members of the association designated by it, who shall each be entitled to cast one vote. The members so designated shall be officers of the association who are members of the board of trustees of pension fund subchapter two. Each such designee may at any time, by written authorization filed with the board, authorize any other officer of the association to act in his or her place as a member of the board in the event of such designee's absence from any meeting thereof; provided that the by-laws or constitution of the association provide for the designation of a representative for such purpose.

* * *

[former] § 13-271 **Payment of supplemental benefits.** a. The board may in its discretion authorize payments from the variable supplements fund to pension fund beneficiaries pursuant to the provisions of this subchapter. Subject to the provisions of subdivision b of this section, such payments may be made in such form, in such

amount and in such cases as the board may in its discretion determine; provided however, that the board, in so exercising its discretion, shall give consideration to equity, fairness and principles of prudent management.

b. (1) No pension fund beneficiary shall have a right to receive variable supplements except to the extent, in the manner and for the period authorized by the board in the exercise of its discretion pursuant to this subchapter and any such supplements granted may at any time be discontinued by the board in the exercise of such discretion.

(2) The legislature hereby declares that the variable supplements authorized by this subchapter and the granting and receipt thereof:

(i) shall not create or constitute membership in a pension or retirement system and shall not create or constitute a contract with any pension fund beneficiary or with any member of pension fund, subchapter one or pension fund, subchapter two; and

(ii) shall not constitute a pension or retirement allowance or benefit under pension fund, subchapter one or pension fund, subchapter two or otherwise.

(3) Except as otherwise provided in section 13-232 of this chapter, nothing contained in this subchapter shall create or impose any obligation on the part of pension fund, subchapter one or pension fund, subchapter two or the funds or monies thereof, or authorize such funds or monies

to be appropriated or used for any payment under this subchapter or for any purpose thereof.

* * *

§ 13-272 **Variable supplements fund; a corporation.** The variable supplements fund shall have the powers and privileges of a corporation and by its name all of its business shall be transacted, all of its funds invested, all warrants for money drawn and payments made, and all of its cash and securities and other property held.

§ 13-277 **State supervision.** a. The variable supplements fund shall not make any payments to pension fund beneficiaries unless a plan setting forth the basis and amounts of such payments and the qualifications for receipt thereof is first filed with the superintendent of insurance and approved by him or her as consistent with the provisions of this subchapter.

b. The superintendent of insurance may examine the affairs of the variable supplements fund with the same powers and jurisdiction as are applicable in the case of an examination of a life insurance company by the superintendent under article three of the insurance law. The variable supplements fund shall be subject to assessment for expenses pursuant to the provisions of section three hundred thirteen of the insurance law, but shall not be subject to assessment for expenses under any of the provisions of section three hundred thirty-two of such law.

Note: Sections 13-278 through 13-287 are substantially identical to sections 13-268 through 13-277 (see supra p. ___).

UNION BILL TO IMPLEMENT COLLECTIVE BARGAINING AGREEMENT ON VARIABLE SUPPLEMENTS (NY S.7220 of 1970)

STATE OF NEW YORK

7220

IN SENATE

February 4, 1970

Introduced by Messrs. MARCHI, BLOOM -- read twice and ordered printed, and when printed to be committed to the Committee on City of New York

AN ACT

To amend the administrative code of the city of New York, in relation to establishing variable supplements funds with respect to beneficiaries of the New York police department pension fund, article one and the New York police department pension fund, article two.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter eighteen of the administrative code of the city of New York is hereby amended by adding thereto two new articles, to be articles three and four, to read as follows:

ARTICLE 3

§ B18-60.0 [now 13-268] Definitions --

* * *

5. "Pension fund beneficiary". Any person who (a) receives a retirement allowance by reason of having retired for service . . . .

* * *

ARTICLE 4

§ B18-80.0 [now 13-278] Definitions --

* * *

5. "Pension fund beneficiary". Any person who (a) receives a retirement allowance by reason of having retired for service . . . .

* * *

EXHIBIT B TO PODOLSKY AFFIDAVIT: PROPOSED COLLECTIVE BARGAINING AGREEMENT

PATROLMEN'S BENEVOLENT ASSOCIATION
of the City of New York
250 Broadway
New York, N.Y. 10007

February 3, 1969

To All Members:

The following revised version of the proposed collective bargaining agreement between the Patrolmen's Benevolent Association and the City of New York, as amended January 29th, was unanimously accepted by the 35-member PBA Negotiating Committee and overwhelmingly approved by the Executive Body of Delegates by a vote of 309 to 8 at the regular January meeting. It is herewith presented for your consideration, with new material underscored in bold type.

This proposal substantially improves the previous offer by including significant gains in salary, night differential, overtime, and optional features covering special time off. The improvements were obtained in exchange for the one concession of extending the contract by three months.

Specific gains include additional salary increases of $100 per year on October 1, 1968 and October 1, 1969, for a total of $200 above and beyond raises contained in the earlier proposal, a 5% night differential

effective January 1, 1969, overtime pay at the rate of time-and-one-half, payable in cash or compensating time off at the sole option of the patrolman, effective July 1, 1969; and seven days time off payable in cash, in time, or a combination of the two, at the sole option of the patrolman.

Ballots will be in the hands of all delegates for distribution to every patrolman on Monday, February 3, 1969. If you accept the proposed agreement contained herein, vote "YES" in the space provided on your ballot. If you wish to reject the contract, vote "NO" accordingly. All ballots must be received not later than 12:00 noon on Monday, February 10, 1969 in order to be tabulated.

It is of the utmost importance that you make your decision and act at once. Complete and mail the ballot immediately after receipt!

Fraternally,

/s/ John J. Cassese
JOHN J. CASSESE
President

PROPOSED
COLLECTIVE BARGAINING AGREEMENT
between the
PATROLMEN'S BENEVOLENT ASSOCIATION
and the
CITY OF NEW YORK
(LATEST REVISION-JANUARY 29, 1969)

* * *

Supplemental Pension Fund

The City and the Association agree to cause to be paid over to a separate fund, established within the present Police Pension Fund, the proceeds of the annual yield and capital appreciation, realized or unrealized, earned by reason of an investment in equities in excess of the yield which would have resulted from investments such as bonds, mortgages and other fixed income accuracies. The purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis, for Articles I and II, as determined by the trustees. The fund shall be jointly administered by two trustees, who shall be the Mayor or his representative on the Police Pension Board and the Association designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by (arbitrator to be selected); or if he fails or is unable to serve, by the arbitration provisions of this Collective Bargaining agreement.

It is also agreed that the City and the Association shall jointly sponsor and support appropriate legislation to expand within a reasonable scope the present permissable [sic] limits on investments.

The calculation to determine the amount to be paid over to the separate fund shall be made annually, not later than 30 days after the close of the fiscal year for which payment is due, and payment shall be made within 30 days thereafter.

* * *

SEMI-PRIVATE HOSPITAL ACCOMMODATIONS FOR LINE-OF-DUTY INJURIES

The City will prepare, submit, and support legislation to amend the present law so as to provide semi-private hospital accommodations for patrolmen injured in the line of duty.

[Marginal notation:] Note: implies retirees are in medical plan and states they can change coverage in next changeover period.

[end of document]